

In the United States Bankruptcy Court

for the

Southern District of Georgia

Savannah Division

FILED

at 12 O'clock 15 min P M

Date 2/28/01

MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia SB

In the matter of:

DANIEL A. WELZEL, JR.
(Chapter 7 Case Number 98-42613)

Debtor

WILEY A. WASDEN, III
TRUSTEE

Plaintiff

v.

WOODSTOWN NATIONAL BANK
AND TRUST COMPANY,
COLLECTIVE BANK,
ROBERT J. SHIELDS,
ANCORA PSYCHIATRIC HOSPITAL,
and SUMMIT BANCORP

Defendants

Adversary Proceeding

Number 99-4199

ORDER ON MOTION OF SUMMIT BANCORP TO SET ASIDE JUDGMENT

The Trustee filed a complaint to determine the validity and extent of liens on certain real estate owned by the Debtor, Daniel A. Welzel, Jr. On February 22, 2000, the Trustee amended his complaint and added Summit Bancorp ("Summit") as a party defendant alleging that Summit Bancorp was a successor by merger to an original named

defendant, Collective Bank. The amended complaint asked the Court to rule on the extent and validity of Summit Bancorp's lien, on real estate of the Debtor, which originated with a mortgage of record in favor of Collective Bank in the principal amount of \$40,000.00. The Trustee served copies of the original and amended complaints by certified mail to Summit Bank and to Summit Corporate Secretary, Inc., Summit's registered agent for service. The Trustee also served a copy of the complaint and amended complaint by facsimile to Mitch Mackler in Summit's legal department on February 29, 2000. On March 6, 2000, a summons and notice was issued to all the defendants, including Summit, requiring them to file an answer within thirty (30) days and to attend a Rule 16 conference before the Court on April 12, 2000. The April 12 conference was subsequently reassigned to April 27, 2000.

At the Rule 16 conference, the Trustee was represented by his counsel, Andrew Bowen. There was no appearance by Summit, either in defensive pleadings or in person, at the hearing. The Court issued a notice that the trial would be conducted on May 31, 2000. Subsequently, the trial was continued to July 27, 2000. The notice of the continued trial was served by the Trustee to all parties in interest on May 23, 2000. The certificate of service reflects that the Trustee served Summit by mail to Summit Bank, Summit Corporate Section, and John Giangrossi, as well as by facsimile to Mitch Mackler and Robert J. Gunther, Esquire.

On July 27, 2000, the matter was called for trial and the only appearance was that of Mr. Bowen, counsel to the Trustee. The record revealed that the only timely answer had been filed by Defendant Woodstown National Bank and Trust Company ("Woodstown"). The Trustee announced that he had reached a stipulation with Woodstown that its lien was valid and would be paid out of any proceeds of a sale of the property. The Trustee further proffered that Summit Bancorp, despite proper service and despite its verbal acknowledgment of receipt of the complaint, had filed no formal answer. The Trustee enumerated the numerous contacts he had with counsel and staff members at Summit Bancorp. The Trustee also represented to the Court that Summit Bancorp had provided insufficient proof to convince the Trustee to voluntarily dismiss Summit Bancorp as a defendant. He moved the Court, due to Summit's default, to determine that Summit Bancorp's lien would be set aside rendering Summit Bancorp's claim a general unsecured claim in the case. The Court ruled that Summit Bancorp's lien would be disallowed and directed Trustee's counsel to prepare a proposed order. The order was entered of record on August 1, 2000. No appeal was taken from this judgment.

On October 11, 2000, Summit Bancorp filed this Motion to Set Aside the Court's order entered on August 1, 2000, disallowing its lien and requested permission to file an answer. The Motion alleges that the Trustee's complaint seeking a determination of the extent and validity of the lien did not "fairly advise a lay person that Summit's valid mortgage would be invalidated if Summit failed to file an answer." The Motion also

alleged that Summit had provided the Trustee with a payoff figure for the loan. Attached as exhibits to the Motion are what appears to be a Line of Credit Note executed by Anton Welzel Contracting Company, a mortgage executed by Daniel A. Welzel, Jr., in favor of Summit's predecessor, Collective Bank, and a copy of a June 15, 2000, facsimile transmission sheet from Yvonne E. Belo-Osagie to Andrew Bowen, Esquire, counsel to the Trustee, which revealed the payoff figure as of June 27, 2000.

The Motion to Set Aside was supported by the affidavit of Tammara Mirra-Feldman which acknowledged that Summit received the amended complaint on or about February 28, 2000. Summit was servicing approximately 400,000 home equity loans at the time, none of which listed Mr. Welzel individually as borrower. Summit asserts it could not match the Debtor's name with a corresponding borrower and was unable to do so until sometime during May 2000 when Summit received the Trustee's notice to sell the real estate which is the subject of this adversary proceeding.

The Trustee filed a response to Summit Bancorp's Motion to Set Aside which established that the amended complaint filed on February 22, 2000, was served on Summit Corporate Secretary, Inc., the registered agent for service of process for Summit Bancorp, and that it was received on February 28, 2000. Thereafter, on February 29, 2000, the Trustee faxed a copy of the amended complaint to Mitch Mackler in Summit's legal department. On April 26, 2000, a copy of the amended complaint and summons was

also faxed to Robert J. Gunther, Esquire, and contained the following request: "Please ask whoever is handling this to call me as soon as possible." (Facsimile Transmission Report from Bowen to Gunther of 4/26/00). On April 28, 2000, Mr. Bowen was contacted by one Maryanne Candelora of Summit Bancorp who requested a copy of the mortgage in question to aid her in determining the status of the outstanding account. On the same date, April 28, John Giangrossi, Recovery Manager of Summit Bancorp, wrote Mr. Bowen acknowledging receipt of the copy of the mortgage, but revealing that Mr. Giangrossi was confused as to the legal significance of the mortgage in that he interpreted it as a mortgage in favor of Anton Welzel Contracting Company rather than a mortgage in favor of Summit Bancorp or its predecessor. (Letter from Giangrossi to Bowen of 4/28/00). After further conversation between Mr. Bowen and Mr. Giangrossi, the Trustee faxed to Mr. Giangrossi a copy of the mortgage from Daniel A. Welzel, Jr., to Summit's predecessor, Collective Bank, in order to clarify the nature of the indebtedness which was of record.

The Trustee's response also established that the Trustee filed a Motion for Leave to Sell the property in question on May 30, 2000, which prompted an inquiry from Yvonne Belo-Osagie as to whether Summit would receive payment on its pending lien.¹ On June 15 and June 20, 2000, Ms. Belo-Osagie provided the payoff amount of the loan, a copy of the mortgage, the note and payment history to Mr. Bowen. On June 30, 2000, Mr. Bowen wrote Ms. Bela-Osagie advising her that to date there had been no answer filed

¹By Order entered July 21, 2000, the Court granted the Trustee's Motion to Sell the property .

by Summit Bancorp and recommending that Summit obtain counsel to assist it and further stating that "it appears as if Summit has foregone its rights to defend our action." (Letter from Bowen to Belo-Osagie of 6/30/00). No further response was received by the Trustee from Summit or anyone acting on its behalf. No answer was filed to the complaint nor was any appearance entered at the trial which took place on July 27, 2000, nearly a full month subsequent to Mr. Bowen's June 30 letter.

The Trustee produced a May 15, 2000, letter from Mr. Bowen to John Giangrossi that enclosed a copy of the adversary proceeding and stated, "[t]his lawsuit requires that the named parties produce evidence of the extent and validity of their liens or stand the risk of having those liens stripped. To this point, we have had no answer in this lawsuit from Summit Bank." (Letter from Bowen to Giangrossi of 5/15/00). The letter also urged Summit to file an answer to the complaint with the Court as soon as possible.

Subsequently, Summit filed affidavits of Ms. Bela-Osagie and Mr. Giangrossi. Of particular relevance to the matter before me, Ms. Bela-Osagie's affidavit acknowledges that on June 20, 2000, Mr. Bowen advised her that a hearing was scheduled and that Summit should have an attorney present. She asserts, however, that Mr. Bowen did not advise her that the documentation she had previously provided him concerning the extent of the Summit lien would be disregarded or that the lien would be disallowed if an

attorney did not appear. She acknowledged receipt of Mr. Bowen's June 30, 2000, letter, but stated that she was confused by the letter because she thought it contradicted previous assurances of Mr. Bowen regarding Summit's interest in the property. She stated that she attempted to reach Mr. Bowen to clarify the meaning of his letter, but did not hear from him until August 18, after the trial date and the entry of this Court's Order.

Mr. Giangrossi's affidavit asserts that initially the bank was unable to identify the account in question because the borrower was Anton Welzel Contracting Company, not the Debtor Daniel Welzel, but he acknowledges that eventually Summit made the connection between the corporate note and the individual debtor. The affidavit further states, "[a]fter Ms. Bela-Osagie's considerable discussion with Bowen, Summit decided not to hire local counsel to answer the complaint because Summit had provided the Trustee with the relief sought in the complaint - clear proof of the extent and validity of Summit's lien on the Property." (Giangrossi Aff. at 2-3). He also states that Summit relied on Mr. Bowen's prior assurances to Ms. Bela-Osagie that if the Trustee was provided with sufficient evidence of the extent and validity of Summit's lien then Summit did not have to appear at the hearing.

Finally, the Trustee supplemented his response to the Motion to Set Aside with the affidavit of W. Andrew Bowen, Trustee's counsel. Mr. Bowen agrees that in an early conversation with Ms. Bela-Osagie he "did indeed indicate that if we received

information sufficient to satisfy us, we would dismiss the case against Summit Bank voluntarily." (Bowen Aff. at 1). The affidavit goes on to state, however, that he reviewed all documents submitted by Summit prior to trial, as well as those documents filed in support of Summit's Motion to Set Aside, and that he deemed the information provided to be insufficient to establish the extent and validity of Summit's lien on the property. He states that he notified Ms. Bela-Osagie in writing of that fact and that in order to protect its interest, Summit would need to file an answer and/or appear in court to defend the complaint. This fact, as noted above, is acknowledged by Ms. Bela-Osagie in her affidavit and by the documents of record. (Belo-Osagie Aff. pp. 2-3; Letter from Bowen to Belo-Osagie of 6/30/00).

CONCLUSIONS OF LAW

Summit Bancorp filed this Motion to Set Aside pursuant to Rule 60(b)(1) of the Federal Rules of Civil Procedure which is incorporated by Bankruptcy Rule 9024. Rule 60(b)(1) provides, "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b). The Supreme Court has concluded that the determination of the sort of neglect that will be considered excusable is an equitable one and takes into account all relevant circumstances surrounding the party's omission. Pioneer Investment Services Co. v. Brunswick Associates L.P., 507 U.S. 380, 395, 113 S.Ct. 1489, 1498, 123 L.Ed.2d

74 (1993). There are three elements which Summit must show in order to establish relief: (1) it has a meritorious defense that might affect the outcome; (2) granting the motion would not result in prejudice to the non-defaulting party; and (3) a good reason exists for failing to reply to the complaint. Florida Physician's Insurance Co., Inc. v. Ehlers, 8 F.3d 780, 783 (11th Cir. 1993)(citing E.E.O.C. v. Mike Smith Pontiac GMC, Inc., 896 F.2d 524, 528 (11th Cir. 1990)). This motion was filed within the one-year limitation set forth in Rule 60(b). A motion under Rule 60(b) is directed to the sound discretion of the trial court and denial of relief will be set aside on appeal only for an abuse of discretion. Florida Physician's Insurance Co., Inc. v. Ehlers, 8 F.3d at 783; Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. Unit A 1981).

Summit argues that its failure to file an answer to the complaint was the result of excusable neglect. Summit enumerates several factors to establish the "good reason" element for failing to reply to the complaint. These factors include the assumption of the note and mortgage from Collective Bank, that the loan was not readily identifiable because the name listed on the mortgage was not the debtor's name and it was inadvertently classified as a consumer home equity loan, the fact that the loan was not in default, and the mistaken belief that the documents forwarded to the Trustee obviated the requirement to answer the amended complaint. In addition, Summit contends that the amended complaint does not notify Summit that the lien would be invalidated if it did not file an answer nor did it put Summit on notice that the consequence of a default judgment

would be the voiding of the mortgage. The Trustee asserts that Summit's actions and inactions in this adversary proceeding amount to a lack of diligence on its part, not excusable neglect.

The Eleventh Circuit Court of Appeals has established that a good reason must exist in order for the Court to set aside a default judgment. In re Knight, 833 F.2d 1515, 1516 (11th Cir. 1987). Summit carries the burden of proof to establish that a good reason exists for failing to reply to the complaint and the entry of the default. Gibbs v. Air Canada, 810 F.2d 1529, 1537 (11th Cir. 1987). In the Florida Physician's Insurance Company, Inc. v. Ehlers case, the Eleventh Circuit provided insight as to the standards required for establishing a good reason for failing to respond to the complaint. In that case, the Court reiterated that "[t]he failure to establish minimum procedural safeguards for determining that action in response to a summons and complaint is being taken does not constitute default through excusable neglect." 8 F.3d at 784 (quoting Gibbs, 810 F.2d at 1537). The evidence in this case reveals that the Trustee served Summit with the amended complaint three (3) times in February 2000 and one (1) time in April 2000, each service was to a different location or person. Despite acknowledging receipt of the complaint and having several discussions with the Trustee regarding the case, including contact by members of Summit's legal department, Summit never filed an answer or responsive pleading to the complaint, nor did it make any court appearance during the pendency of the adversary proceeding. Summit asserts that it failed to respond to the complaint because

it was not able to identify the name listed on the mortgage with the debtor, the loan was listed as a consumer home equity loan, and that the loan was not in default. The Court recognizes that Summit is a large corporation and services a substantial number of mortgages. However, the Court is not persuaded that the reasons provided by Summit as to its inability to identify the loan at issue establish a good reason for failing to respond to the complaint. Summit has a responsibility to respond to litigation and to ensure that appropriate action is taken to protect its interests. Okchi v. Security Bank of Bibb County, No. 5:99-CV-397-4(DF), 2001 WL 92199, at *4 (M.D.Ga. Jan. 31, 2001). Summit had actual notice of the complaint but failed to have sufficient procedures or take appropriate steps to insure that action was undertaken to protect its interests after receiving the complaint. Summit's actions in this case and failure to file a responsive pleading to the complaint reflect a lack of minimum procedural safeguards which should be in place to respond to a summons and complaint. *See* Florida Physician's Insurance Company, Inc. v. Ehlers, 8 F.3d 780 (11th Cir. 1993)(Defendant did not establish good cause for the default where his failure to ensure his interests were sufficiently represented demonstrated a lack of diligence); Davis v. Safeway Stores, Inc., 532 F.2d 489 (5th Cir. 1976)(Excusable neglect not found where defendant timely forwarded complaint to insurance company but answer was not filed due to the lack of communication between defendant and insurance company which indicated an absence of minimal procedural safeguards). *See also* Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc., 840 F.2d 685 (9th Cir. 1988)(Court affirmed denial of motion for relief where defendant's culpable conduct was

responsible for entry of default judgment because defendant's president, an attorney, had actual notice of the filing of the complaint, failed to file an answer, and was presumably aware of the dangers of ignoring service of process). Contra Okehi v. Security Bank of Bibb County, No. 5:99-CV-397-4(Df), 2001 WL 92199 (M.D.Ga. Jan. 31, 2001)(Court found "good reason" existed under Rule 60(b)(1) to grant relief from judgment where Defendant's failure to respond to a federal complaint, which Defendant did not realize was pending, was the result of confusion surrounding the same day filing and service of the federal complaint and a virtually identical state law complaint); Olympia Holding Corp. v. Gaynor Electric Co., Inc. (In re Olympia Holding Corp.), 226 B.R. 705 (Bankr. M.D.Fla. 1998)(Court found excusable neglect to set aside a default judgment where the defendant had a good reason for failing to respond to the complaint and did all that it could do to defend the complaint upon learning of the default).

Given this record, Summit's utter failure for nearly three months to identify its interest in the case, hire counsel, file an answer, or seek an extension is inexcusable. Even the most unsophisticated person served with a summons is expected, indeed required, to respond to a complaint or risk default judgment. Summit is to be held to no lesser standard simply because it is "too big." If it has grown, and acquired business, beyond its ability to timely defend litigation - that is an unfortunate cost of doing business sloppily - not excusable neglect. Its failure to answer by May 30, three months after service, is inexcusable.

Summit makes the further contention that its conversations with Mr. Bowen in June 2000 and providing documentation of its security interest to the Trustee were sufficient to protect its interests in the property and alleviated the need to respond to the complaint. Summit asserts that Mr. Bowen assured them during conversations in June 2000 that if it provided evidence of its lien in the property, then it would not have to appear in Court and its interest in the property would be protected. Mr. Bowen acknowledges having these conversations with Ms. Belo-Osagie during June 2000 wherein he indicated that if he received sufficient information, he would voluntarily dismiss the pending complaint. However, Mr. Bowen's assertion is uncontradicted that after reviewing the information provided by Summit, he was not in a position to dismiss the complaint. (Bowen Aff. p. 1). He sent a letter on June 30, 2000, to Ms. Belo-Osagie informing her that there was no answer to the complaint, that the matter was in default, and recommended that Summit retain counsel to handle the adversary proceeding because "Summit has foregone its right to defend our action." (Letter from Bowen to Belo-Osagie of 6/30/2000).

These discussions do not in any way explain or excuse Summit's then three month default in earlier failing to respond to the complaint. At most, the discussions between Mr. Bowen and agents of Summit about providing documentation to the Trustee account for Summit's failure to answer the complaint for the period between June 15 and

June 30. On June 30, it is uncontradicted that the Trustee informed Summit that its informal response was insufficient and that it would be required to defend the case on the merits. At that time, Summit had ample opportunity to file a response to the complaint, make an appearance in the case, or seek a continuance of the trial, but failed to do so. Summit was fully advised of the trial date as the Trustee served five notices of the July 27, 2000, trial date on Summit to five different locations, three by mail and two by facsimile. Ms. Belo-Osagie admitted in her affidavit that Mr. Bowen had already informed her on June 20 that there would be a hearing and that Summit should have an attorney appear at the hearing. (Belo-Osagie Aff. at. 2). Even though Summit received written and verbal notices from the Trustee of the trial date, Mr. Giangrossi admitted in his affidavit that Summit made a conscious decision not to hire local counsel to answer the complaint because it believed its informal response was sufficient. (Giangrossi Aff. at 2-3). However, Mr. Bowen's verbal notice on June 20 and his June 30 letter, which were provided after he received that documentation, put Summit on notice that the matter was still unresolved and that it should retain counsel to protect its interest. Thus, even if Summit originally believed that the documentation provided was sufficient to satisfy the Trustee, Mr. Bowen put Summit on notice after that time that the matter was not resolved. I hold there was sufficient time for Summit to act to protect its interests in some manner between the time it received Mr. Bowen's June 20 and June 30 communications and the trial held on July 27, 2000.

Summit argues that the Trustee's complaint seeking a determination of the extent and validity of the lien did not "fairly advise a lay person that Summit's valid mortgage would be invalidated if Summit failed to file an answer." (Summit Motion to Set Aside at 2). The original complaint requests that the defendants produce evidence supporting the validity of their liens and for the Court rule on the extent and validity of the liens. The amended complaint incorporates the same language and prayers for relief from the original complaint. A plain reading of both complaints shows that the Trustee not only requested documentation to support the liens on the property, but sought a ruling from the Court determining the extent and validity of the lien. The un rebutted evidence reflects that Summit was served with the complaint four (4) different times, two of which were to employees of Summit's legal department. The Court finds that the language in the complaint is sufficient to put one on notice that the status of the lien is in question and should evoke some type of response from the defendant. Indeed, Woodstown National Bank managed to understand its duty, the nature of the complaint, filed a timely answer, proved its lien priority to the Trustee's satisfaction prior to trial, and was then relieved of further appearances. *See supra* at 3.

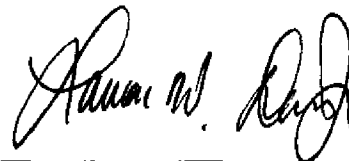
The summons for the amended complaint required that an answer be served on the Trustee within thirty (30) days from March 6, 2000. The following language appears in bold type on the face of the summons: "If you fail to respond in accordance with this summons, judgment by default may be taken against you for the relief

demanding by the complaint." Such language clearly put all defendants on notice that the consequence of failing to respond to the complaint would be the entry of a default judgment. Recently, the Eleventh Circuit emphasized the importance of default: "[t]he threat of default (and default judgment) is the court's primary means of compelling defendants in civil cases to appear before the court. If these defaults could be put aside without cause, the threat of default would be meaningless, and courts would lose much of their power to compel participation by civil defendants." African Methodist Episcopal Church, Inc. v Ward, 185 F.3d 1201, 1203 (11th Cir. 1999).

In addition to the language of the complaint and the summons, the evidence reflects that the Trustee put Summit on notice as to the consequences of failing to file an answer to the lawsuit. Specifically, on May 15, 2000, Mr. Bowen wrote to Mr. Giangrossi, enclosed a copy of the adversary complaint, and stated, "[t]his lawsuit requires that the named parties produce evidence of the extent and validity of their liens or stand the risk of having those liens stripped. To this point, we have had no answer in this lawsuit from Summit Bank. . . I would urge that you file an answer with the Court as soon as possible." (Letter from Bowen to Giangrossi of 5/15/00). The Court finds that Summit received adequate notice from the complaint and summons, supplemented by the letter to Mr. Giangrossi, that the consequence of the failure to file an answer to the complaint would jeopardize Summit's lien on the property.

In conclusion, having considered all of the evidence, the Court finds that Summit has not provided any meaningful justification for its dilatory conduct in failing to file an answer or responsive pleading to the complaint. The factors outlined by Summit do not constitute a "good reason" to support excusable neglect under Rule 60(b)(1). Having found that Summit has failed to demonstrate a "good reason" for causing the default to be entered, the Court will not address the "meritorious defense" and "prejudice to the opposing party" elements required to set aside a judgment under Rule 60(b)(1).²

Accordingly, it is ORDERED that the Motion of Summit Bancorp to Set Aside Order Disallowing Lien and to Permit Summit Bancorp to File an Answer is denied.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 27th day of February, 2001.

²Summit argued that it had conclusive evidence to support a meritorious defense to the complaint in the form of documents provided to the Trustee. Summit provided the Trustee a copy of the Line of Credit Note, Mortgage, and copy of the Certificate of Merger with Collective Bank. Summit also provided a loan payoff and computer printout of the "collective history" of the loan. At trial, the Trustee asserted that the information and documentation was not sufficient to convince the Trustee to voluntarily dismiss the complaint as the Trustee sought information regarding the timing of advances and payments on the line of credit to make a determination as to the avoidability of any transfers. See 11 U.S.C. §§ 543, 544, 545, 547, 548, and 549. The Court, having reviewed the loan documentation and computer printouts provided by Summit, is satisfied that the Trustee's position was reasonable and that further explanation of the documents, specifically the "collective history" of the loan, was warranted. The computer printout incorporates several internal codes and does not clearly reflect the dates of advances or payments on the loan, which is the exact information the Trustee sought by filing the complaint and requesting proof of the validity and extent of the lien.